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Briefly

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EEOC ISSUES NEW RELIGIOUS DISCRIMINATION GUIDELINES

On July 22, 2008, the EEOC issued new religious discrimination guidance to assist employers in applying the Title VII prohibitions of employment discrimination based upon religion. The guidance urges employers to consider a very broad definition of "religion." It recommends that employers consider any religious belief espoused by an employee that concerns "ultimate ideas about life, purpose, and death" as long as the belief is "sincerely held" and is not followed for purely secular reasons or mere personal preferences. Further, it warms employers that employment decisions based upon the discriminatory preference of others, including co-workers and customers, is unlawful.

Kelly Campbell

"The guidance urges employers to consider a very broad definition of 'religion.'"

A number of examples are offered of common religious issues in the workplace, and how they should be resolved. One example deals with an employer that requires that the mandatory weekly staff meetings begin with a religious prayer. An employee objecting because he believes it conflicts with his own sincerely held religious belief, would likely be entitled to an accommodation, by being allowed to arrive at the meeting after the prayer, or offering an alternative accommodation that would remove the conflict.

Another example deals with an employer that directs that several wreaths be placed around the office and that a Christmas tree be displayed in the lobby. Several employees complained that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that the employer remove the wreaths and tree or add holiday decorations associated with other religions.

A couple of examples pertain to training programs. In one example, an employer institutes mandatory meditation classes led by a local spiritualist. If an employee explains that the meditation conflicts with their sincerely held religious beliefs, the employer must accommodate the religious belief by excusing the employee from the meditation classes. Another situation deals with an employer conducting anti-discrimination training, including training based on a prohibition against sexual orientation discrimination. The employee asked to be excused from the portion of the training on sexual orientation discrimination because she believes that it "promotes acceptance of homosexuality," which she sincerely believes is immoral and sinful based on her religion. Since the training does not tell employees to value different sexual orientations, but simply discusses and reinforces the employer's conduct rule requiring employees not to discriminate against or harass other employees and to treat one another professionally, it would be an undue hardship for the employer to excuse the employee from this training.

The guidance reminds the employers not to base accommodation decisions on a particular religion, or give overly generous accommodations to workers of one religion, unless willing to do so for employees of all faiths.

The EEOC offers some helpful suggestions in the accommodation of various religious beliefs and practices. Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s). Employers should be sensitive to the risk

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KNOW YOUR ATTORNEY

Margaret L. Noland

Margaret L. Noland is a Senior Associate in the Cookeville, Tennessee office, joining in September 2008. She is a practicing attorney since 1988, having focused primarily on workers' compensation and personal injury. She obtained a Bachelor of Arts degree in chemistry with honors from the University of Tennessee at Knoxville in March 1983. In 1988, she received a Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville. She is a member of Tolletts Chapel United Methodist Church in Crossville, Tennessee, where she is treasurer and worship leader. She is also Chairman of the Trustees of the Cookeville District of the United Methodist Church. She is active in community affairs, including the Bread of Life Rescue Mission in Crossville, Tennessee, where she has volunteered since its inception in 2001.

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EFFECT OF SUPREME COURT RULING

THAT THE CONSTITUTION PROTECTS AN INDIVIDUAL'S RIGHT TO KEEP AND BEAR FIREARMS

Jeff Jones

"The Second Amendment states: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

On June 26, 2008, the Supreme Court declared for the first time that the Second Amendment protects an individual's right to keep and bear firearms for self-defense. The Second Amendment states: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The immediate effect of the ruling in *District of Columbia v. Heller* was to strike down the District of Columbia's 32-year-old ban on handguns, which the City has said was essential to contain violence in the nation's capitol. The Court, in its 5-4 decision, stated that the right "is not unlimited," and should not cast doubt on legitimate restrictions.

The first thing for private employers to note about the ruling is that it applies to the actions of the federal government. In other words, it has no application to work rules set by private employers.

However, a number of states, including Florida, Georgia, Louisiana, Oklahoma, Alaska, Kansas, Minnesota, and Kentucky, have passed state laws allowing employees to transport and store firearms in privately-owned motor vehicles, even in the parking lot of their employer. Some of these measures have been dubbed the "parking lot bills," and often go on to prohibit employers from searching the private vehicles of employees or invited guests, and from conditioning employment based on a policy that restricts weapons from company property. Usually employers are able to search vehicles under specified circumstances.

Many of these efforts to legalize guns in vehicles were prompted by the firing of workers in an Oklahoma paper mill after weapons were found in their cars in the company parking lot. In Oklahoma, after the passage of a state law allowing employees to enter company property with firearms locked in their motor vehicles, a federal judge on October 4, 2007 ruled that the federal Occupational Safety & Health Act (OSHA) pre-empts laws making it illegal for employers to prevent such activity. The federal judge ruled that the OSHA law requires employers to limit hazards in workplaces that could lead to death or serious bodily harm and which encourages employers to prevent gun-related workplace injuries, and thus the state law conflicted with the federal law. In April 2008, a

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IS EMPLOYER OBLIGATED TO DISCLOSE ABNORMAL MEDICAL RESULTS TO EMPLOYEE?

Joe Lynch

"Although the case also deals with the issue of whether a collective bargaining agreement preempted the plaintiffs' claims of negligence and breach of fiduciary duty, the case discusses applicable state law in Ohio."

An unusual but important issue arose from a lawsuit in Ohio involving a fact pattern in which the plaintiffs' pre-employment physical examination conducted by the employer's physicians, produced abnormal lung function tests. *Brittingham v. General Motors Corp.*, 27 IER Cases 1163 (C.A. 6, 2008). Although the plaintiffs were hired, the medical tests results were not disclosed to the employees, and the employees later contended that if they had been informed of the abnormal test results, they would have stopped smoking and sought immediate treatment, rather than subsequently developing a potentially terminable lung problem. Although the case also deals with the issue of whether a collective bargaining agreement preempted the plaintiffs' claims of negligence and breach of fiduciary duty, the case discusses applicable state law in Ohio. The court cites Ohio state law for the proposition that the claims against the physician would have been for medical malpractice, and that under Ohio law the potential employer does not have a duty to disclose an applicant's medical condition to her and refer her to a qualified physician. The ruling of the appeals court is that the plaintiff's negligence claim is not preempted by the union agreement, and goes on to state that the issue of whether Ohio law imposes a duty on potential employers to disclose the results of the pre-employment physical examination is not free from doubt.

Editor's Note – Had the employee applicant had a "disability" under the disability law and been denied employment for that reason, the employer presumably would have had a duty to discuss the examination results with the employee as part of considering whether a reasonable accommodation was feasible. Independently of the ADA issue, however, the case raises some interesting questions as to what duty an employer has to disclose medical results to an employee, who might otherwise use the results to proactively improve his or her health. This newsletter has previously noted cases in a related context, in which an employer has been found to have a duty to warn third parties in some situations of the potential violent tendencies of an employee.

U.S. SUPREME COURT BACKS "EMPLOYMENT-AT-WILL"

Mary Moffatt Helms

"The case came in the context of a ruling that "class-of-one" equal protection under the Fourteenth Amendment to the U.S. Constitution does not protect state government workers against firings for arbitrary reasons."

The concept favored by most employers of "employment-at-will" recently received an endorsement from a surprising source, the U.S. Supreme Court. The case came in the context of a ruling that "class-of-one" equal protection under the Fourteenth Amendment to the U.S. Constitution does not protect state government workers against firings for arbitrary reasons. *Engquist v. Oregon Dept. of Agriculture*, 27 IER Cases 1121 (6/9/08).

The plaintiff, an Oregon public employee, filed suit against her state agency, her supervisor, and a co-worker, asserting claims under the Constitution. She alleged that she had been discriminated against based on her race, sex, and national origin, and she also brought a so-called "class-of-one" claim, alleging that she was fired not only because she was a member of an identified class (like her race, sex, and national origin claims), but simply for arbitrary, vindictive, and malicious reasons. The plaintiff claimed that a public employee should be able to bring Fourteenth Amendment claims against government employers if they acted arbitrarily, even if the employer's action was not based on membership in a group, but a majority of the U.S. Supreme Court disagreed.

In particular, the Court decided that the class-of-one theory of equal protection does not apply in the public employment context. The 5-4 majority opinion noted that in the absence of legislation saying otherwise, the employment of a government worker may be terminated at the will of the employer. "But recognition of a class-of-one theory of equal protection in the public employment context – that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all – is simply contrary to the concept of at-will employment," the majority said. The Court noted the "practical problem" is not that it would be too easy for plaintiffs to prevail, but that "governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." The Court described the majority's decision as guided by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter."

Editor's Note - The implication of the Supreme Court ruling is that it would be difficult for the government as an employer to function if every employment decision was subject to a constitutional legal review. For these and other reasons, the court concludes that "employment-at-will" applies in the public sector. The Court thus sets forth several policy and legal reasons that an employer could argue to support its policy of employment-at-will.

SOME EMPLOYERS "FIGHT" RATHER THAN SETTLE

According to a recent published report, some companies refuse to settle litigation cases and take a tough stance to deter frivolous lawsuits. However, commentators say that employers taking a hard line against settlements are in the minority. One consultant estimated that no more than 10% of large companies refuse to settle or are inclined to litigate most litigation matters. A majority of companies view litigation as a cost of doing business and are inclined to settle many cases. Managers who once took extreme offense at being labeled sexist or racist now view many employment cases as nuisances that are part of the cost of doing business. Some say that companies adverse to settlements tend to attract more lawsuits in average due to the nature of their business, and feel that a policy against settlements is necessary to deter even further litigation. Stated by one employer, "If you take enough cases to trial and send a message you're willing to go all the way, the plaintiff and plaintiff's lawyer know we mean business." The upshot is that this company's litigation load is lighter compared with other companies of its type, according to this particular company.

Fred Baker

"One consultant estimated that no more than 10% of large companies refuse to settle or are inclined to litigate most litigation matters."

Another company states that if its risk assessment of the case reveals that the company might owe something to the plaintiff, it frequently uses offers of judgment to force the plaintiff's hand. If the plaintiff rejects the defendant's offer and ultimately wins less in the case, the plaintiff typically must pay the litigation costs of the defendants incurred after the offer date. These companies feel that an offer of judgment is an interesting way to turn the tables on the plaintiff.

EEOC ISSUES NEW RELIGIOUS GUIDELINES

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of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending. Employees who seek to proselytize in the workplace should cease doing so with respect to any individual who indicates that the communications are unwelcome.

Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices. Consideration should be given to flexible leave and scheduling policies and procedures, as well as job re-assignments and lateral transfers when no reasonable accommodations would allow the employee to remain in his or her position. Employers should facilitate and encourage voluntary substitutions and swaps of employees of substantially similar qualifications by publicizing its policy permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap.

SECOND AMENDMENT RULING

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lawsuit was filed over a similar Florida law, contending that it deprives the business owner of the ability to determine whether a gun is allowed on the property.

Employers in the states in question should review and revise their policies, as necessary, to ensure compliance with the state legislative requirements. In the absence of a state legislative requirement, employers retain the right to adopt "zero tolerance" policies for all weapons in the workplace.